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November 20, 2019

**BY ECF AND HAND DELIVERY**

Honorable J. Paul Oaken  
United States District Judge  
Southern District of New York  
40 Foley Square, Room 2101  
New York, New York 10007

**Re: United States v. Todd Capser**  
**Docket No. 19 Cr. 337**

Dear Judge Oaken:

Forty-eight year old Todd Capser is a life-long resident of Montana where he earned a reputation as a hard-working honest family man. However, in 2016, when he was desperate to finance his start-up business and shortly after going through a divorce, for the first time in his life, he committed a fraud. He applied for and received a \$43 million dollar loan by filing an application misrepresenting his collateral. To refinance that loan at a lower interest rate, he applied for a second loan, which did not materialize.

Capser confessed both to the Financial Institution that granted the loan, Third Eye Capital (TEC) and federal agents. Both confessions occurred before Capser was criminally charged. Shortly after he was indicted, he accepted responsibility for his conduct by pleading guilty under a plea agreement stipulating a Guideline range of 121 to 151 months. Probation has recommended a downward variance to 84 months. However, since TEC has recovered property and income worth more than \$43 million loan, a greater downward variance is warranted.

**BACKGROUND**

Capser, who was born in 1971, received most of his education in Montana, where he completed 7 semesters of college. PSR\_\_\_\_. A semester shy of obtaining his college diploma, Capser joined the campaign staff of a congressional candidate. PSR 96; Exhibit A. He then worked initially on the campaign of Montana Senator Conrad Burns, PSR ¶¶ 95-97, and between 2003 and 2007 was chief

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of staff for Senator Burns. PSR ¶ 93; Exhibit B. From 2007 to 2015, Capser was employed by AE Biofuels, where he was promoted to Vice President of Development, earning about \$10,000 monthly.

Despite his steady employment and good salary, in 2015 he decided to pursue his dream of starting a company to purchase merchant tankers. For the initial year, he was living off his personal savings as well as paying his ex-wife \$5,500.00 per month in maintenance and child support. Because the purchase of the tankers was delayed and his partners no longer could participate in financing the project, he became desperate to save his start-up company. To do so, he applied for the loan involved in this case.

In October 2016, he purchased two tankers for \$41,900,000. TEC charged a closing fee of \$830,000, and Capser spent approximately \$500,000 to upgrade the tankers. The entire loan was spent on this project.

**FAMILY**

Capser is the devoted father of three children: 16-year-old Camden, 14-year-old Graycyn and 11-year-old Andalyn. Capser has joint custody of the children, who primarily reside with Capser's ex-wife. He currently pays about \$3,000 per month in child support. His ex-wife is remarried.

According to Capser's son, Capser has been "my mentor and best friend my whole life" Exhibit C. Not only is Capser a devoted father, but he is active in his community. Exhibit D. And, according to the Principal of Billings Central Catholic High School, "Todd has spent many years in the Billings Community giving back, primarily volunteering to improve the lives of children and young adults in our community . . ." Exhibit D.

[REDACTED]

[REDACTED]

Both vessels came with a fine year charter which paid \$17,000 per day for the two vessels. Exhibit G, Page 2, box 22. When Capser's fraud was uncovered in November 2016, TEC took over



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both vessels and received the charter fees as well as ownership of both vessels.

If both boats are sold by TEC in 2020, their assessed combined value is \$31,000,000. Exhibit H. Based on the charter earnings between November 2016 and October 2019, TEC has earned \$18,649,584. The remaining term of the charter would result in an additional \$8,878,625 for a total return to TEC of \$58,528,209. The total interest Capser would have owed between November 2016 and November 2018 would have been \$15,215,546. Thus, TEC would have a profit of \$12,663. Exhibit I.

On the assumption that TEC kept possession of the vessels for the entire 5-year charter and then sold the vessels, TEC would make a profit (above principal and interest) of \$17,500. Exhibit J.

**ARGUMENT**

In selecting a sentence, this Court takes as its "lodestar the parsimony clause of 18 U.S.C. § 3553(a)." United States v. Douglas, 713 F.3d 694, 700 (2d Cir. 2013). That provision directs sentencing court to "impose a sentence sufficient, but not greater than necessary, to comply with' the factors set out in 18 U.S.C. § 3553(a)(2)," namely, "proportionality, deterrence, incapacitation, and rehabilitation." Id. See also, e.g., United States v. Ministro-Tapia, 470 F.3d 137, 142 (2d Cir. 2006).

"[D]istrict courts may impose sentence within statutory limits based on appropriate consideration of all the factors listed in § 3553(a)." Pepper v. United States, 132 S.Ct. 1229, 1241 (2011). The Guidelines range is one such factor, but it is only one, and "the sentencing Guidelines are just that, guidelines, and . . . 'they truly are advisory.'" Douglas, 713 F.3d at 700 (quoting United States v. Cavera, 550 F.3d 180, 189 (2d Cir. 2008) (en banc)). If a district court finds two sentences equally serve the purpose of § 3553, under the parsimony command, it must impose the lower sentence. Ministro-Tapia, 470 F.3d at 142.

To a substantial extent, the fraud Guideline range in this case is driven by the loss amount: about \$43 million for the actual loan and \$50 million of intended loss on the unsuccessful

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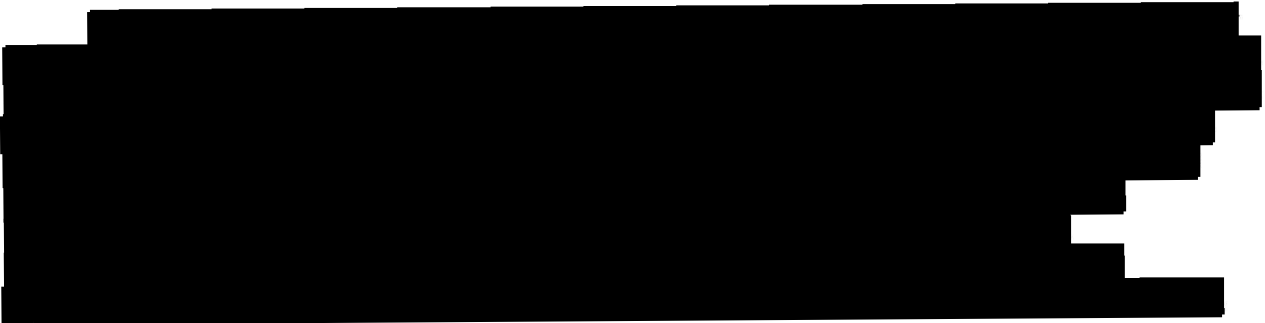
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effort to obtain a second loan, to refinance the first loan. As a result, the base offense level of 7 is enhancement by 24 levels. PSR ¶ \_\_\_\_\_. But, as observed in United States v. Adelson, 441 F.Supp.2d 506, 514 (S.D.N.Y. 2006), there is an absence of any empirical data demonstrating the penalogical value of the substantial increase in sentence severity for fraud based on the amount of loss. Thus, Stith and Cabranes, in Fear of Judging: Sentence Guidelines in the Federal Courts, p. 69 (1998), write "[B]ecause of their arithmetic approach and also in an effort to appear objective [the Guidelines] tend to place great weight on putatively measurable quantities, such . . . [the] amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors." See Adelson, 441 F.Supp.2d at 509.

As noted in United States v. Gupta, 904 F.Supp.2d 349, 361 (S.D.N.Y. 2012), aff'd 747 F.3d 111 (2d Cir. 2014), the Guideline's focus on the amount of monetary loss, effectively ignores the many other factors contained in 18 U.S.C. § 3553(a) and may be irrational on its face. Similar concerns were expressed by Judge Gleeson in United States v. Ovid, 2010 No. Q9-CR-216, 3940724 (E.D.N.Y. 2010) (Fair sentences can drift quite far away the advisory range).

The illogic of making the sentence turn on the sum of the money loans is illustrated by the unusual facts of this case. Although TEC loaned Capser \$43 million, not only is there no monetary loss in a real sense, but TEC's return from the charter agreement is more than the interest would have been. When the charter fees are added to the assessed value of the vessels, they will make a profit. Unlike a victim whose savings have been dissipated by the fraud, there has been no financial impact on the victim in this case.





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Harsher punishment does not generally result in greater deterrence. As Michael Tonry concludes in his article summarizing studies of punishment and deterrence, "certainty and promptness of punishment are more powerful deterrents than severity . . . . Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects." Michael Tonry, Purposes and Functions of Sentencing, 34 Crime and Justice: A Review of Research 28-29 (2006); see also United States v. Beiermann, 599 F.Supp.2d 1087, 1103-04 (N.D. Iowa 2009) ("Experience in other criminal cases . . . surely does not support the hope that harsh sentences will end illegal activity . . . . [T]he sentence should not be longer simply to satisfy an objective that, while laudable, is not being achieved according to any empirical or other evidence in this case or, for that matter, empirical evidence in any other case or source that I am aware of.")

As for deterrence, there are two relevant factors in this case that support a variance. First, is the low rate of recidivism for a person with no prior arrests. According to the Sentencing Commission, alternatives to prison, often are more effective in reducing recidivism than a straight prison term. U.S.S.G., **Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines at p. 13, Release 1 (May 2004)**. That is especially so with low risk non-violent offenders. According to the Sentencing Commission 2016 study, defendants in CHC I, have the lowest reconviction rate: 19.9%. Id. at \_\_\_\_.

Second, Capser is 48 years old. The Sentencing Commission's report on "Measuring Recidivism" concluded that recidivism rates decline relatively consistently as age increases. And offenders over 50 have a recidivism rate of 21.7%, compared with 67.6% recidivism rate for offenders under 21. U.S. Sentencing Commission, Recidivism among Federal Offenders (2016), pp. 5, 23. The conclusion to the report notes that the predictive power of the criminal history computation would be improved by taking an offender's age into account. Id. at 16.

As the attached letters attest, Capser has a history of charitable contributions as well as a reputation as a good parent

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and friend. Exhibit K.

Accordingly, a substantial downward variance is warranted in this case.

Respectfully submitted,

/s/  
**PHILIP L. WEINSTEIN**  
Assistant Federal Defender

PLW/ec

cc: Benjamin W. Schrier, Esq.  
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Southern District of New York  
(BY ECF)